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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,

Petitioner,

—v.—

GARY DEFILLIPPO,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, *AMICUS CURIAE*

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INTEREST OF AMICUS

Amicus is a state affiliate (with over 8,000 members) of the American Civil

Liberties Union, which has been active for nearly sixty years trying to preserve, protect and defend the basic liberties guaranteed by the Bill of Rights. In our view, the Fourth Amendment rights at issue in the present case are an essential component of the concept of liberty as it has been understood by the traditions of the American people and of Anglo-American law; and the rule requiring the exclusion of evidence obtained in violation of the Fourth Amendment is a condition sine qua non for the preservation of these rights.

Amicus (through its Metropolitan Detroit Branch) was granted leave to participate in this case in the Michigan Court of Appeals. The case presents questions going both to the validity of the Detroit ordinance under which respondent was arrested and searched without probable cause, and to the admissibility of evidence obtained through such an illegal search. The constitu-

tional invalidity of this type of ordinance has been thoroughly briefed by the parties both herein and in Brown v. Texas, No. 77-6673, and will not be addressed in this brief. A statement of our views with respect to the inadmissibility of evidence secured in reliance on such an ordinance may, however, be of aid to the Court in its consideration of the present case.*

STATEMENT OF THE CASE

This case involves the warrantless search of the person of Gary DeFillippo, an American citizen standing harmlessly on a back street in Detroit. The result of the search was the discovery of a small quantity of phencyclidine inside a package of cigarettes DeFillippo was carrying in his left breast pock-

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*/Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

et. As a result of the search, DeFillipo was charged with possession of phencyclidine, a felony under Michigan law.

At the hearing on DeFillippo's motion to suppress, the officer who searched him testified that the search which discovered the phencyclidine was conducted pursuant to DeFillippo's arrest on a different charge. Specifically, he said, (A-9), DeFillippo had violated Ordinance No. 143-H, Chapter 39, Article I of the Code of the City of Detroit which authorizes arrests of a "person [who] is unable to provide reasonable evidence of his true identity" or who refuses to do so. However, DeFillippo was never prosecuted on that charge.

When the trial court denied DeFillippo's suppression motion, he took an interlocutory appeal to the Michigan Court of Appeals. The Michigan Court of Appeals held that the ordinance underlying DeFillippo's arrest was void for

vagueness, that the search conducted pursuant to the arrest was consequently illegal, and that the evidence discovered as a result of the search could not be used against him. The Michigan Supreme Court denied the State's application for leave to appeal on May 1, 1978. This Court granted the State's petition for a writ of certiorari on October 2, 1978. Insofar as the state court proceedings are concerned, the matter is still in an interlocutory posture.

SUMMARY OF ARGUMENT

An arrest pursuant to an unconstitutional ordinance is an unlawful arrest. Evidence seized during a search incident to such an arrest is inadmissable at a criminal trial. The Court has held that an arresting officer's subjective good faith, including reliance on an unconstitutional law, will not validate an otherwise unlawful search, or render evidence

seized incident to an unlawful arrest admissible. Beck v. Ohio, 379 U.S. 89 (1964); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); see Franks v. Delaware, 57 L. Ed. 2d 667 (1978). The deterrence rationale underlying the Fourth Amendment exclusionary rule fully supports exclusion of evidence seized under the circumstances presented by this case.

The courts below have not yet ruled on several important matters of state law which might obviate the need for a decision on constitutional grounds. Accordingly, at this interlocutory stage, the Court should dismiss the writ of certiorari as improvidently granted in order to avoid deciding these constitutional questions prematurely. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936), (Brandeis, J., dissenting).

ARGUMENT

I. A SEARCH OF A DEFENDANT'S PERSON CANNOT BE SUSTAINED AS INCIDENT TO A LAWFUL ARREST WHERE THE ORDINANCE PURSUANT TO WHICH THE ARREST TOOK PLACE IS UNCONSTITUTIONAL; EVIDENCE SEIZED PURSUANT TO SUCH A SEARCH MUST BE SUPPRESSED EVEN IF THE ARRESTING OFFICER ACTED IN GOOD FAITH.

Except in a few carefully limited circumstances, warrantless searches are per se invalid. See, e.g., Mincey v. Arizona, 98 S. Ct. 2408, 2412 (1978); Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978). The rule requiring a warrant is subject to exceptions, but the only exception possibly applicable in DeFillippo is that which permits warrantless searches as an incident of lawful arrest. See Chimel v. California, 395 U.S. 752 (1969). This exception presupposes, however, a lawful arrest. Johnson v. United States, 333 U.S. 10, 15 (1948); Beck v. Ohio, 378 U.S. 89, 91 (1964). If the arrest had been valid, a search of the defendant's person would have been permissible under United States v. Robinson, 414 U.S. 218 (1973). However, the arrest was invalid because the underlying ordinance was unconstitutional. Accordingly,

under this Court's cases, the search was also invalid, and any evidence derived therefrom must be suppressed. The Michigan Court of Appeals so held. People v. DeFillippo, 80 Mich. App. 197, 203, 262 N.W.2d 921, 924 (1977); Joint Appendix (JA) 22.

The prosecution argues, however, that the search may be sustained on either of two grounds, even though the arrest was effected pursuant to an unconstitutional ordinance. It submits (1) that an arrest and concomitant search are not unlawful where the police acted in good faith, relying on an ordinance which was only later declared to be unconstitutional (Petitioner's Brief, pp. 8-13) and; (2) that even if the arrest was unlawful, in such circumstances the exclusionary rule ought not be applied to bar use at trial of evidence obtained as a result of the arrest (Petitioner's Brief, pp. 14-21). Acceptance of either of these arguments would require overruling prior decisions of this Court which have held, or assumed, that for purposes of determining both the validity of an arrest and the applicability of the exclusionary rule in a criminal trial "good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U.S. 98, 102 (1959), Beck v. Ohio,

378 U.S. at 97; Almeida-Sanchez v. United States, 413 U.S.266 (1973)

A. An Arrest Based On A Statute Subsequently Held Unconstitutional Is Invalid Under Both Michigan Law And The Fourth Amendment.

The prosecution's first argument concerns the legality of the arrest itself. An arrest in reliance on an ordinance not yet declared unconstitutional is said to be valid regardless of the actual unconstitutionality of the ordinance. The state contends that an officer's belief that he has power to arrest is a valid substitute for actual authority to arrest. That contention is without merit. The arrest is invalid under state and federal law.

1. The arrest is invalid under state law.

Although the issue is discussed by the prosecution wholly in constitutional terms, the validity of an arrest would seem to be, at least in the first instance, a question of state law. Within limits set by the Fourth Amendment, the power to arrest, and the validity of an arrest, is primarily defined by state law. Ker v. California, 374 U.S. 23, 37 (1963). The existence of

state law conferring authority to arrest is itself a requisite of valid arrest under the Fourth Amendment. Police have no general authority to arrest; they must be able to point to some specific provision, either of statute or common law, authorizing any action which interferes with personal liberty. This, at bottom, is the teaching of the General Warrant Cases, such as Entick v. Carrington, 19 How. St.Tr. 1030 (1765), which the Fourth Amendment was meant to incorporate. Officers do not have plenary power to engage in searches and seizures of either property or persons. They must be authorized to act by law, by state law: in this case, Michigan law.

Arguably, the decision below represents a judgment that arrest under a void ordinance is invalid by virtue of Michigan law, independent of the Fourth Amendment. The defendant was arrested under a city ordinance. The Michigan arrest statute limits an officer acting without warrant to arresting for misdemeanors, including ordinance violations, "committed in his presence." Mich. Comp. Laws Ann. § 764.15(a) (1968); see B. J. George, Michigan Criminal Procedure § 1:05(B)(2) (1978). The statute, like common law, does not appear to allow for even

reasonable error in cases of arrest for misdemeanor; it seems rather to require that the officer be absolutely "correct in his judgment that a crime is indeed being committed in his presence." G. Holmes & B. J. George, An Introduction to Michigan Civil and Criminal Procedure 239 (1974); Wise, "Criminal Law and Procedure," 1974 Ann. Survey of Mich. L., 21 Wayne L. Rev. 401, 411 (1975). If no crime was committed, the arrest is invalid. In People v. Dixon, 392 Mich. 691, 222 N.W.2d 749 (1974), the Michigan Supreme Court expressly excluded the possibility that under Michigan law "a police officer may arrest for the commission of a misdemeanor on probable cause," thereby adhering to the legislative requirment that a person be arrested for a misdemeanor only if he has actually committed it in the presence of an arresting officer. 392 Mich at 695, 222 N.W.2d at 750. Accordingly, it appears that Michigan continues to hold an officer to the strict standard of actual commission when he arrests for a misdemeanor.[1/] If the law under which he purports

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1/ People v. Carpenter, 69 Mich. App. 81, 244 N.W.2d 338 (1976), cited in Petitioner's Brief, p.9 n.3, concerns a felony arrest, and is therefore inapposite. It has been suggested that this statement in Dixon does not

(footnote 1 continued on the following page)

to act turns out to be invalid, the arrest is consequently unlawful.

2. The arrest is invalid under the Fourth Amendment.

State law apart, arrest pursuant to an ordinance conferring unconstitutional powers on the police constitutes an independent violation of the Fourth Amendment. Good faith, even if relevant in determining the appropriateness of a particular remedy for the constitutional violation,does not "make otherwise lawful conduct illegal or unconstitutional," id. at 136, and it cannot make otherwise unlawful conduct lawful. The test of compliance with the Fourth Amendment is essentially objective. Under the Fourth Amendment, the facts known to the officer are always to be "judged against an objective standard." Terry v. Ohio, 392 U.S. 1, 21

(footnote 1 continued from previous page) necessarily preclude arrest on probable cause as to the in-presence commission of a misdemeanor. 2 State Bar of Mich. Special Committee for the Revision of Crim. Proc., Proposed Revisions of the Michigan Code of Crim. Proc. § 115 comment, at 144-48 (1976). On the other hand, it may. See Wise, "Criminal Law and Procedure," 1973 Ann. Survey of Mich. Law, 20 Wayne L. Rev. 365, 382 n. 106 (1974). At best, the Michigan law on point is unclear. Id. at 144.

(1968); Scott v. United States, 436 U.S. at 137; see also Henry v. United States, 361 U.S. 98, 102-03 (1959). "If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Beck v. Ohio, 378 U.S. 89, 97 (1959). The test of compliance with a law which establishes standards of conduct is "external, and independent of the degree of evil in the particular person's motives or intentions." O.W. Holmes, The Common Law, 43 (M. Howe ed. 1963).

There are three groups of cases in which officers have nevertheless claimed reliance on a statute or ordinance only later declared unconstitutional:

(a) First, there are cases which say that an arrest is not invalid even though the law defining the crime for which the defendant was arrested is later declared unconstitutional. See, e.g., Johnson v. United States, 370 F.2d 489, 491 n.2 (D.C. Cir. 1966); Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976). The theory seems to be that insofar as probable cause suffices for arrest, the police may be regarded as having acted on probable cause

when they relied on the law as it stood at the time of the arrest; although generally required to know the law, they are not required to anticipate the possibility that the law on which they rely will subsequently be held to be unconstitutional. The two cases cited by Petitioner from the Fifth Circuit, United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) and United States v. Carden, 529 F.2d 443 (5th Cir. 1976), appear to accord with this position. See Petitioner's Brief, pp. 10-11. See also United States v. Dameron, 460 F.2d 294 (5th Cir. 1972).[2/] However, Kilgen and Dameron are distinguishable as involving consent searches rather than searches incident to arrest, and therefore holding "only that invalidation of the underlying substantive statute does not vitiate the consent to search," Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976); Carden, Wright, and most other federal cases outside the District of Columbia, supra, may be read as holding only

2/ Cf. Moffett v. Wainwright, 512 F.2d 496, 502 n.6 (5th Cir. 1975); and Hamrick v. Wainwright, 465 F.2d 940, 941-42 (5th Cir. 1972), in which the issue is mentioned but not reached.

that where a state defendant is arrested for one offense, searched, and then prosecuted and convicted for a wholly different offense, the validity of the law defining the offense for which he was initially arrested cannot be questioned through federal habeas corpus. Those cases are therefore irrelevant when a state court chooses to decide the constitutionality of the underlying ordinance, as did the court below.

(b) Second, there are cases in which the law defining the offence for which the defendant was initially arrested is unconstitutionally vague because it subverts not only notions of due process but also principles incorporated in the Fourth Amendment. These cases have typically involved vagrancy ordinances permitting, in effect, arrest on mere surmise about wrongdoing. The defendant is then prosecuted for a more serious offence based on evidence turned up during a search incident to arrest for violation of the ordinance. The most fully considered cases on point have permitted the validity of such an ordinance to be questioned in the ensuing proceedings. Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972) (en banc), noted in 18 Vill. L. Rev. 117 (1972), 47 N.Y.U.L. Rev. 595 (1972); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974); Powell

v. Stone, supra; United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); see also Worthy v. United States, 409 F.2d 1105, 1110 (D.C. Cir. 1968) (dissenting opinion). The police cannot be regarded as having acted on probable cause even if they relied on the ordinance where the very effect of the ordinance was to eliminate any meaningful requirement of probable cause as the standard for arrest.

(c) Finally, there are cases in which a statute has directly authorized searches and seizures in a manner incompatible with the principles of the Fourth Amendment. E.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967). In all of these cases a search was found invalid and evidence suppressed, notwithstanding the officer's good faith reliance on a statute which had not been declared unconstitutional at the time of the search.

Even if the present case were regarded as falling within the first or second of these groups, the Michigan Court of Appeals could still properly choose to consider, as it did, the constitutional validity of the arrest and search from which evidence against

the defendant was derived. In fact, the present case falls within the third category. Detroit Ordinance 143-H directly authorizes a particular type of search and seizure incompatible with the Fourth Amendment. Thus, a holding that the search is invalid, despite the officer's claim of reliance on a standing ordinance, is compelled by Almeida-Sanchez. The prosecution recognizes the similarity and its attempt to distinguish Almeida-Sanchez is unavailing. (Petitioner's Brief, pp. 11-13, 17-18). The Detroit ordinance is said to be primarily penal, aimed at defining criminal conduct, and not merely at authorizing search and seizure of persons who fail to produce adequate proofs of their identity. This distinction, however, is not persuasive. Like 8 U.S.C. § 1357(a), the statute involved in Almeida-Sanchez, the Detroit ordinance is immediately concerned with specifying official powers: it sets out the power of the police to demand evidence of "true identity" and to take into custody those who fail to produce such evidence. And although those who refuse to comply with an officier's demand for self-identification are said to act unlawfully, and are therefore subject to 90 days imprisonment and a fine of $500 under the separate provisions of Detroit City Code § 1-1-7, resisting

a search under 8 U.S.C. § 1357(a) is also an offence, punishable by three years imprisonment under the separate provisions of 18 U.S.C. § 2231. See, e.g., Gibilterra v. United States, 428 F.2d 393 (9th Cir. 1970) (prosecution for resisting border searches). The Fourth Amendment would be reduced to "a form of words," Mapp v. Ohio, 367 U.S. 643, 648 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919), if a legislature could immunize unconstitutional police search practices from challenge simply by making it a crime not to submit to them, confident that state officials would prosecute only for other substantive offenses.

B. Evidence Seized In A Search Incident To An Unconstitutional Arrest Is Subject To Exclusion At Trial Even If The Arresting Officer Acted In Good Faith.

The prosecution's second argument concerns the applicability of the exclusionary rule. Even if the defendant's arrest was invalid, it is said that the exclusionary rule should not apply to bar the use of evidence obtained as a result of his illegal detention "where the officer acted in good faith reliance on an ordinance not yet declared unconstitutional." Petitioner's Brief, p.14. This conclusion is said to follow from recent statements by this

Court to the effect (a) that the primary purpose of the exclusionary rule is to deter unlawful police conduct, United States v. Calandra, 414 U.S. 338, 347 (1974); United States v. Janis, 428 U.S. 433, 446 (1976); Stone v. Powell, 428 U.S. 465, 486 (1976); (b) that unlawful conduct may not be deterrable where official action is "pursued in complete good faith," Michigan v. Tucker, 417 U.S. 433, 446 (1974), and (c) that, therefore, the exclusionary rule ought not apply unless the officer knew or should have known that the search in which he engaged was unconstitutional, United States v. Peltier, 422 U.S. 531, 542 (1975).

This Court has held that a constitutional right to be secure against illegal searches necessarily requires the government to relinquish any advantage it may have gained "over the object of its pursuit by doing the forbidden act," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919), and to refrain from using "knowledge obtained by that means which otherwise it would not have had." Id. at 391. Silverthorne held, and commentators have agreed, that an accused's right to be restored so far as possible to the position he was in prior to an illegal search

is the foundation of the exclusionary rule. See, e.g., Schrock & Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974). Government cannot assume a license to interfere with constitutional rights, even if it were willing (which it is not) to pay for the privilege. The requisite form of redress for a violation of the Fourth Amendment is therefore a sanction against governmental use of evidence acquired through constitutionally forbidden means.

More recently, the Court has explained the exclusionary rule as a "deterrent safeguard", Mapp v. Ohio, 367 U.S. 643, 648 (1961): not a perfect deterrent to be sure, but given the impotence of available alternatives, one "without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" Calculations about whether its deterrent objectives will be served have recently been the decisive considerations in determining the types of cases in which the exclusionary rule should be applied.

The notion that the exclusionary rule ought not apply where its incremental efficacy as a deterrent may be doubted has been adopted only with respect to peripheral uses of

illegally obtained evidence: United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings); United States v. Peltier, supra, (retroactive applicability of Almeida-Sanchez v. United States); United States v. Janis, 428 U.S. 433 (1976) (state-seized evidence in an IRS assessment proceeding); Stone v. Powell, supra, (collateral federal review of state convictions); United States v. Ceccolini, 435 U.S. 268 (1978) (live-witness testimony tenuously connected with the initial illegality). None of these cases involves a motion to supress direct use of unconstitutionally seized evidence in a criminal trial uncomplicated by the problem of retrospectivity at issue in United States v. Peltier.

Notwithstanding recurrent suggestions for change, claims of good faith on the part of arresting officers have never been held sufficient reason for suspending operation of the exclusionary rule in the criminal trial.[3/]

3/ It has been suggested that, even in a criminal trial, the deterrent purposes of the exclusionary rule might not be impaired if it were restricted to cases of "egregious, bad-faith conduct" (Stone v. Powell, supra at 501 (Burger, C.J., concurring)), or not applied where evidence was seized by an officer having reasonable grounds for a "good faith belief that his conduct comported with existing law" (footnote 3 continued on next page)

See, e.g., Beck v. Ohio, 378 U.S. 89, 97 (1964). The criminal trial has always been the paradigmatic case for full application of the exclusionary rule. The decisions of this Court "recognize no exception to the rule that illegally seized evidence is inadmissible at trials." Davis v. Mississippi, 394 U.S. 721, 723 (1965). An exception of the sort urged here by the prosecution would require reversal of Almeida-Sanchez v. United States, 413 U.S. 266 (1973); the distinction between DeFillippo and Almeida-Sanchez proposed by petitioner is wholly fictitious. See supra at 17. And the proposed exception would be inconsistent with two decisions of this Court last term. In Mincey v. Arizona, 98 S. Ct. 2408 (1978), evidence was held inadmissible even though it

(footnote 3 continued from previous page)
(id. at 538 (White, J. dissenting)), or where there was only a "technical" violation of the Fourth Amendment by an officer acting in good faith "pursuant to a statute that subsequently is declared unconstitutional" (Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring). See also H. Friendly, Benchmarks 261 (1967); ALI Model Code of Pre-Arraignment Procedure § 290.2 (Proposed Official Draft 1975); Israel, "Criminal Procedure, The Burger Court, and the Legacy of the Warren Court 75 Mich. L. Rev. 1319, 1408-1415 (1977).

was obtained by officers whose claim to have acted in good faith reliance on previous decisions of the state Supreme Court was not seriously in doubt. See id. at 2412 n.4. And in Franks v. Delaware, the Court held that evidence seized under a facially valid warrant must be suppressed if the warrant is based on an affidavit containing intentional misstatements, even if the searching officer acted in good faith (i.e., was not responsible for or aware of the misstatements). Franks v. Delaware, 57 L. Ed. 2d 667 (1978).

What the prosecution proposes, then, is a novel exception to the exclusionary rule in direct conflict with previous -- and recent -- decisions of this Court. This exception would permit a plea of official error juris, at least in certain circumstances, to bar application of the exclusionary rule in a criminal trial. Such an exception is said to be a matter of bringing the operation of the exclusionary rule into line with its predominantly deterrent purpose. But even assuming, arguendo, that the sole objective of the exclusionary rule is to deter official misconduct, that objective would be better served by application of the exclusionary rule in criminal trials, than by creation of a new exception to that rule, based on the claim that public officials acted in good faith.

Analogy to the criminal law is instructive. The exclusionary rule, like the criminal law itself, aims ex hypothesi to reduce the frequency of prohibited types of behavior.[4/] Criminal law, like the exclusionary rule, may also serve other purposes, but reducing the incidence of misbehavior is generally conceded to be its primary objective.

Sanctions aim at preventing offenses either by others ("general prevention") or by the offender himself through means of (a) intimidation (i.e., "specific deterrence"), (b) reformation, or (c) incapacitation. Insofar as it aims at deterring future misconduct, the exclusionary rule is largely a matter of "general prevention." Doubts have been expressed about the deterrent efficacy of the exclusionary rule. But equally serious doubts have been expressed about the capacity of the criminal law itself to deter criminality, and no one has suggested scuttling the criminal law. On the contrary, it is currently urged on all sides that general prevention (although limited by the concept of desert) ought to be regarded as the only sufficient controlling

4/ Cf. N. Walker, Sentencing in a Rational Society 3-4 (1971).

aim of any rational system of punishment.[5/] This current emphasis in criminological theory on general prevention is based on recognition that the preventive effects of punishment are not limited to its intimidating influence on those offenders who engage in conscious utilitarian calculation about the prospective costs and benefits of pursuing illegal activity. General prevention is a complex process, involving more than the threat of sanction to restrain potential offenders who happen to be directly influenced by it. Punishment also serves as an educative, socializing, conditioning force, helping to form and strengthen inhibitions and to sustain habits of law-abiding behavior on the part of those not normally disposed to commit offences.[6/]

5/ See, e.g., Struggle for Justice: A Report on Crime and Punishment in America Prepared for the American Friends Service Committee 48-66 (1971); N. Morris, The Future of Imprisonment, 58-84 (1974); A. von Hirsh, Doing Justice: The Choice of Punishments, 35-55 (1976); Fair and Certain Punishment: A Report of the Twentieth Century Fund, (1976); H. Gross, A Theory of Criminal Justice, 375-412 (1978).

6/ See, e.g., H. Packer, The Limits of the Criminal Sanction, 35-45 (1968); F. Zimring & G. Hawkins, Deterrence, 74-89 (1973); J. Andenaes, Punishment and Deterrence, (1974).

Similarly, the exclusionary rule operates not so much by promoting nice Benthamite calculations about the consequences of misconduct, as by fixing, supporting, and reinforcing behavioral standards through the emphatic condemnation of violations, backed by a concrete sanction without which there would be no reason to believe the law really takes its professed standards seriously.

In short, the general preventive purpose behind both criminal law and exclusionary rule is most likely to be served by insisting on compliance with the relevant rules. Where the object is supposed to be simply the prevention of prohibited results, strict liability is imposed even in criminal cases.[7/] It is imposed not only in connection with regulatory offences, but whenever strict compliance is sought.

Objections to strict liability are based mainly on considerations of fairness to the individual accused. It is thought to be unjust to punish someone for a result which was not really his fault. The concept of

7/ See, e.g., United States v. Balint, 258 U.S. 250 (1922); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975).

desert is urged as a limit to what may be done in order to further strictly preventive purposes. Objections in terms of fairness to the accused do not really apply, however, to operation of the exclusionary rule, since the individual officer is not being punished personally. Insofar as the exclusionary rule is open to the same objections as strict liability, the relevent objections are those which suggest that the general aim of deterrence cannot possibly be realized in cases of mistake. Strict liability, it is said, cannot serve to deter a defendant who did not know or have reason to know he was breaking the law. Yet it may serve not only to promote "a greater degree of care", on the part of the enterprise subject to regulation,[8/] but also to influence attitudes concerning the importance of compliance and to reduce occasions for evasion and self-deception.

It is also said that deterrence may not require exclusion where an officer acts in "complete good faith" (see, e.g., Michigan v. Tucker, 417 U.S. 433, 446 (1974)); but the term "good faith" is largely vacuous except as it serves to preclude heterogenous forms of

8/ Michigan v. Tucker, 417 U.S. 433, 447 (1974).

"bad faith".[9] Presumably the form of "bad faith" here contemplated is a search by officers who "had knowledge, or may properly be charged with knowledge that the search was unconstitutional." Cf. United States v. Peltier, 422 U.S. at 542. Thus, as with strict liability generally, the question is not so much whether strict insistence on compliance is likely to encourage greater diligence -- it clearly is likely to do so -- but rather one of the differential effectiveness of strict liability in fostering compliance, as compared with a rule permitting those who violate a rule to show that they exercised all the prudence that might reasonably be expected of them.

Cases and statutes imposing strict criminal liability or otherwise dispensing with the need to show awareness of wrongdoing take it for granted that deterrent efficacy will be significantly impaired by permitting a defense based on even reasonable mistake. Similarly with the exclusionary rule. "The difficulties of establishing the knowledge and purpose of the police, the likely tendency of the police to risk more because of these difficulties, and questions about the will of many lower-court judges to enforce

9/ Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code," 54 Va. L. Rev. 195 (1968)).

the rules as intended" are among the problems which "give rise to grave doubts about the viability" of restricting the exclusionary rule "to situations in which the police are found to have acted willfully or at least negligently." Allen, "Foreword -- Quiesence and Ferment: The 1974 Term of the Supreme Court," 66 J. Crim. L. & Crim. 391, 398 (1975).

So restricting the exclusionary rule would impair its efficacy as a deterrent not simply by inviting officials to gamble on the possibility that a court may be persuaded to find only fortuitous blundering where there was really a low standard of care, or worse, in the observance of constitutional guarantees. The most important deterrent effects of the exclusionary rule are or will be realized through its capacity ultimately to alter and affect not wholly conscious opinions, attitudes, and habits of compliance. Cf. Oakes, "Studying the Exclusionary Rule in Search & Seizure," 37 U. Chic. L. Rev. 664, 756 (1970). Constructing epicycles to the exclusionary rule and institutionalizing occasions for giving vent to doubt concerning the rationality, predictability, validity, or importance of

underlying Fourth Amendment guarantees can only serve to foster not compliance, but confusion.

Nor does the specific claim in DeFillippo, of reliance on an unconstitutional ordinance not yet declared to be so by a court, constitute a special case where those responsible for violation of the Fourth Amendment can say that it was objectively impossible for them to act otherwise than they did. If the ordinance had been previously sustained by the courts (as was, for instance, the ordinance in United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971)), there might be a case of truly invincible error, although even here decisions of this Court indicate that the exclusionary rule will normally apply. See supra, at 22-23. In the present case, the ordinance in question had never met with prior approval at any level of the judiciary. Its enactment and enforcement in effect represent a gamble by the Detroit Common Council that a practice of questionable constitutional validity might possibly survive judicial review, or perhaps never be subjected to it. It may be true, as the prosecution claims, that individual officers cannot be faulted for acting in accordance with the law as it

stands on the books. But the Fourth Amendment does not apply only to policemen; it applies to legislators and administrators as well. Similarly, preventive effects of the exclusionary rule do not operate solely on individual officers. The key to the rule's effectiveness lies in its capacity to influence the attitudes, habits and traditions of society as a whole and particularly those of the law enforcement community of which the individual officer is a part. Thus this Court has rightly emphasized the importance in the long run of encouraging "those who formulate law enforcement policies," as well as "the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Stone v. Powell, 428 U.S. 465, 492 (1976). And in the ALI's Model Code of Pre-Arraignment Procedure § 290.2 (3)(Proposed Official Draft 1975), a violation which "appears to be part of the practice of the law enforcement agency or was authorized within it" is regarded as willful "regardless of the good faith of the individual officer." Even if invincible ignorance of law were to constitute an exception to the operation of the exclusionary rule, it is, in line with the rule's deterrent purposes, government as a whole which must be looked to in deciding whether those responsible for a

particular action are properly chargeable with knowledge that it would violate the Fourth Amendment.

II. THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE RECORD PRESENTS UNRESOLVED QUESTIONS OF FACT AND STATE LAW.

Detroit's Ordinance No. 143-H does not authorize the police to conduct stops of citizens to check their identity unless the officer has "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity." Whether the arresting officer in fact had such reasonable cause in this case is a question that has not yet been resolved. Were the Michigan courts to find that there was no "reasonable cause" to believe that the Defendant's behavior "warrant[ed] further investigation for criminal activity," it would be unnecessary for this Court to rule upon the constitutionality of the ordinance. And it would also be unnecessary for the Court to consider the implications holding the ordinance unconstitutional would have for the Fourth Amendment exclusionary rule.

Accordingly, because a substantial, unresolved question of the application of the Detroit ordinance to the facts of this case may make resolution of the difficult constitutional questions presented here unnecessary, the writ of certiorari should be dismissed as improvidently granted. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) ("The Court will not anticipate a question in advance of the necessity of deciding it.") (Brandeis, J., dissenting).

CONCLUSION

THE DECISION BELOW SHOULD BE AFFIRMED OR, IN THE ALTERNATIVE, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Respectfully submitted,

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